

VO (Migration) [2023] AATA 1938 (15 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs THU HA VO Mr Vo Nguyen Nhat Tran
REPRESENTATIVE:	Ms NGUYEN DAN-PHUONG
CASE NUMBER:	1835877
HOME AFFAIRS REFERENCE(S):	BCC2017/4681125
MEMBER:	Ann Duffield
DATE:	15 May 2023
PLACE OF DECISION:	Canberra
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221(1)(a) of Schedule 2 to the Regulations • •

Statement made on 15 May 2023 at 12:11pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – the parties were validly married – there is a genuine pooling of financial resources by the couple – the couple are viewed by others as being in a spousal relationship – parties were and continue to live together in a genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (the applicant) applied for the visa on 7 December 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because they were not satisfied that there was sufficient evidence before them to support their claims.
4. The applicants were represented in relation to the review. The parties provided the Tribunal with significant additional evidence not available to the delegate at the time of their decision.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of the Migration Act.

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. There is a copy of the parties' marriage certificate indicating

that they were married on 25 November 2017 is on the department file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

11. The delegate refused to grant the visa on the basis that the primary visa applicant (the visa applicant) did not satisfy cl 820.211 because they found that the applicant had provided limited evidence about the claimed relationship and considered it was not sufficient to demonstrate that she is the spouse of the sponsor. The delegate was also concerned over the rapid development of the relationship and questioned the applicant's motive in entering into a relationship with the sponsor.
12. The applicant is sponsored by Michael Ly who is an Australian citizen. A sponsorship form and a copy of the sponsor's Australian citizenship certificate were provided.
13. The applicant was previously married. She and her ex-husband were married on 1 September 1997 and divorced on 5 September 2017. A copy of the divorce order was provided. The applicant has three children from that relationship and one of them is included as a migrating dependant in this application.
14. The sponsor was also previously married. The sponsor and his ex-wife divorced on 27 May 2016. A copy of the divorce order was also provided. The sponsor has four children from that relationship.
15. The parties claim that they first met in person in Yagoona NSW on 11 February 2017 after they got to know each other via an online chat platform. The applicant and sponsor were married in Australia on 25 November 2017. A copy of their Australian marriage certificate was provided.
16. *Consideration of claims and evidence*
17. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
18. The applicant provided additional evidence to the Tribunal including copies of recent bank statements for a Bankwest joint account and for a Commonwealth Bank joint account for the period from December 2021 to June 2022. The statements show regular salary deposits, money transfers and various frequent payments for groceries, health insurance and other purchases.
19. In an undated joint statement from the parties submitted to the Tribunal on 10 November 2020, it states that both of their income is deposited to their Bankwest joint bank account. From there, the sponsor's salary is transferred to the home loan account to pay for credit card, home loan, most bills and personal expenses. The home loan was for the Condell Park property which is a townhouse that the sponsor took a home loan in 2015. The applicant's salary remains in the joint bank account and is used for groceries and her personal expenses.
20. In the sponsor's statement of 13 December 2022 and the applicant's statement of 14 December 2022, the parties give further details on their living arrangements, including that they used to live together with the applicant's son Nhat (the secondary applicant) and the sponsor's two children Matthew and Julia; how they share household expenses before and after all the children moved out in 2021/2022 and with the increase in the applicant's income.

21. Joint receipts/invoices were issued to both names at their home address for their wedding reception on 15 November 2019 and various purchases of goods and services over the years. Evidence of joint ownership of a motor vehicle including a certificate of insurance issued in July 2020 and several vehicle servicing invoices involving the years of 2018 to 2022, was also provided.
22. The Tribunal is satisfied that the financial aspects of the couple's relationship support a finding that they have a mutual commitment to a shared life together to the exclusion of all others and they live together.
23. The Tribunal has considered the nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
24. The applicant provided additional evidence to the Tribunal demonstrating that they continue to live together at the same address. They have provided various correspondence, invoices, notice of tax assessments addressed to the applicant and sponsor jointly or separately at the same address covering the years from 2018 to 2022.
25. According to the parties' statements, they both share the cooking, cleaning and shopping. The applicant provided a Medibank private health insurance membership card in both names and also include the sponsor's youngest child.
26. The Tribunal is satisfied that the nature of the couple's household supports a finding that they have a long-term commitment to a shared life together.
27. The Tribunal has considered the social aspects of the relationship – including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
28. Along with the evidence before the department, the applicant provided an additional 9 witness statements from friends and colleagues which certify that the couples are in a genuine and committed relationship. A statement from the sponsor's daughter states that she lives with his father and the applicant in the same house and she strongly believes that his father's marriage is genuine and her father is a lot happier. Also provided was a brief witness statement from the sponsor's sister and her husband that states that the applicant is now one of the family members and they wish them a happy future together.
29. The applicant provided her and the sponsor's respective tax return summary for 2021-2022 showing both parties declared their relationship in their tax returns.
30. The parties state that they took a trip to Vietnam in February 2019 in order to get to know both of their members of the families. The applicant provided copy of a receipt issued to both names dated 21 January 2019 for a hotel booking in Vietnam for 5 February 2019. They also had a wedding reception party in November 2019 and invoices in relation to the wedding reception were also provided. The parties also state that regularly participate in various social activities. The applicant also provided four photographs showing themselves and others in different social settings.
31. The Tribunal is satisfied that the social aspects of the couple's relationship supports a finding that they have a mutual commitment to a shared life together and that they are recognised as a married couple.

32. The Tribunal has considered the nature of persons' commitment to each other – including the duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
33. The parties met and married within a year and in their written statement, the applicant outlined how her relationship with the sponsor developed from their first meeting online to their marriage on 25 November 2017. The applicant states that she had separated from her ex-husband in April 2013, but only officially divorced in September 2017 after she had met the sponsor.
34. The parties have now been married for over five years. According to the parties' statements, they are fully committed to the relationship and look forward to a positive visa outcome for the applicant so that they can plan their future with more certainty. They love, support and take care of each other. They want to buy a house together. The applicant states that the sponsor has been very supportive of her undertaking study and training in specialised aged care field, as well as her teaching Vietnamese language and voluntary community work on the weekend, and that the sponsor often come along with her.
35. The Tribunal is satisfied that the nature of the couple's commitment to each other supports a finding that they have a mutual commitment to a shared life together to the exclusion of all others and that they live together.
36. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.
37. Therefore, the applicant meets cl 820.211(2)(a) and cl 820.221(1)(a).
38. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 820 visa.

39. **DECISION**

40. The Tribunal remits the application for the Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:

- □cl 820.211(2)(a) of Schedule 2 to the Regulations
- □cl 820.221(1)(a) of Schedule 2 to the Regulations

41.

Ann Duffield
Senior Member

42.

43.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).